



February 27, 2009

Paul F. Kubicek
Aquatic Biology Consulting Scientist
Pacific Gas and Electric Company
3401 Crow Canyon Road
San Ramon, CA 94583

Via electronic mail

Re: Comments of American Rivers on Implementation of the Habitat Expansion Agreement

Dear Paul:

American Rivers appreciates the efforts of DWR and PG&E to implement the Habitat Expansion Agreement (HEA), and your personal effort to solicit American Rivers' input to the process. As a signatory to the HEA, and an advocate of the restoration and protection of rivers for the benefit of salmonids, other river biota and the communities that depend on healthy rivers, we are keenly interested in the success of this program. We would like to provide comments on the status of implementation of the HEA, including the Annual Status Report, dated January 20, 2009, and the "Working List of Potential Habitat Expansion Actions", dated January 13, 2009 ("Working List"), and related issues.

Comments on the Annual Report

1) In several places, the Report states that the HEA was developed to replace the fishway prescription developed by NMFS for the Oroville and Upper North Fork Feather River projects (e.g., page 1, "Purpose", page 3 "Habitat Expansion Agreement Negotiated as an Alternative to Prescribed Fish Passage"). A reader might reasonably conclude that the project described by NMFS in its prescription, i.e., trap and truck fish to the upper North Fork Feather River, is no longer under consideration. However, this is not American Rivers' understanding of the clear intent of parties during negotiations. In fact, it was specifically agreed in negotiations, if not in the HEA itself, that the potential trap and truck passage project to the Upper North Fork Feather was to be included and evaluated along with all other potential actions. The Working List does not include fish passage to the upper North Fork Feather River. We request that this passage option be included in the Working List and evaluated against other options.

2) The Report states on page 3 that NMFS exercised their prescriptive right for fish passage in the FERC relicensing proceedings for the Oroville and Upper North Fork Feather River projects. This section should be clarified to state that NMFS specifically reserved its authority to exercise their prescriptive right for fish passage, as clearly stated in section 12.5 of the HEA. Furthermore, NMFS can exercise its prescriptive fish passage authority under DWR's or PG&E's new project license to

impose fish passage prescriptions if NMFS if the licensees withdraw from the HEA or are in breach of it, as stated in section 12.6 of the HEA.

3) The Report mentions on page 8 that a Work Plan has been developed to guide the Steering Committee's effort, but the Work Plan is available only on the private HEA website. Unless the Steering Committee can demonstrate a good reason to prevent signatory parties, or the public, to access the Work Plan, American Rivers requests the Work Plan be made available on the public HEA website. In the alternative, please provide American Rivers a copy of the Work Plan.

4) The Report lists Technical Accomplishments on page 11, including:

- further defining HEA evaluation and selection criteria and NMFS approval criteria;
- developing the process for evaluating and selecting potential habitat expansion actions;
- preparing a Draft Background Status Report for spring-run Chinook salmon in the Sacramento River Basin.

The Report indicates the Steering Committee intends to finalize the criteria in March 2009 and the process for evaluation and selection by June 2009. American Rivers was provided a copy of the powerpoint presentation shown to participants in the three HEA meetings held in January 2009, which provides some additional indications as to how the Steering Committee is further refining criteria. However, the presentation is not conclusive as to the direction of the Steering Committee's efforts to refine the criteria and evaluation process.

The listed accomplishments have the potential to significantly affect the foundation of the HEA evaluation and thus the final outcome of the HEA process. As such, it seems appropriate that HEA signatories have the opportunity to review and comment on these documents. Of particular interest are the "process for evaluating and selecting" HEA actions and the "further definition of criteria" given that the evaluation criteria were negotiated and specifically included in the HEA. American Rivers requests that all signatories be provided the opportunity to review and comment on these documents prior to their finalization.

General Comments on the Status of HEA Implementation and the Working List

1) We appreciate the efforts of the Steering Committees to develop a comprehensive set of potential actions to consider, as evidenced by the Working List. However, as the Steering Committee continues to define the process for evaluating actions, American Rivers encourages it to keep the entire matrix of criteria in mind, including the NMFS Approval Criteria in section 4.2.3 of the HEA. Many of the potential HEA actions included in the Working List would not individually, or aggregated, meet many of the Evaluation Criteria and Selection Criteria. Nor would many meet several of the NMFS Approval Criteria. The particular NMFS Approval Criteria not met by many actions on the Working List include: (c) supports establishing a geographically separate, self-sustaining population of Spring-Run, (d) supports segregating Spring-Run habitat from Central Valley fall-run Chinook salmon, or (e) meets requirements of eligible habitat expansion action(s) pursuant to Section 3 of this Agreement. American Rivers would like to avoid the possibility of the Steering Committee developing a draft Habitat Expansion Plan that includes actions that do not meet these and other NMFS Approval Criteria.

2) It will be essential for the Steering Committee to develop, in consultation with parties to the HEA, a detailed and transparent process for evaluating and selecting habitat expansion actions for inclusion in the Draft Habitat Expansion Plan. The HEA provides little guidance for this process,

and the evaluation and selection criteria are non-exclusive and non-prioritized. We recommend the evaluation process include, at a minimum, a relative, quantitative and/or qualitative assessment of the contribution of each potential action toward each evaluation, selection and approval criterion. We also recommend the Steering Committee develop a process for using this assessment to help screen out the least promising candidates and identify the most promising candidates. American Rivers requests to be consulted in the development and implementation of the evaluation and selection process.

3) American Rivers notes the Working List contains a number of actions that are components of the Battle Creek Salmon and Steelhead Restoration Project (Battle Creek Project), which is memorialized in the February 1999 Memorandum of Understanding among PG&E and others. The schedule for the Battle Creek Project indicates all restoration components, including those enumerated in the Working List, should have been completed by the end of 2002. American Rivers supports the Battle Creek Project, and hopes for timely resolution of all barriers to its implementation. However, it would appear that all potential actions in the Working List that are part of the Battle Creek Project would not to qualify for implementation pursuant to section 3.2 of the HEA. Nevertheless, we welcome exploring ways in which the HEA might contribute to the restoration of Spring-run and steelhead populations in Battle Creek consistent with section 3.2 of the HEA.

4) Similar to the preceding comment, the restoration of anadromy in the Yuba River watershed is the subject of ongoing, and will be the subject of future, hydropower relicensing proceedings for facilities that currently block anadromous fish from reaching historic habitat in the upper Yuba River. In addition, ongoing litigation seeks fish passage around barriers on the Yuba River. While no specific commitments to provide fish passage has resulted yet from these venues it seems reasonable to expect some form of fish passage to be restored. American Rivers believes the upper Yuba River watershed supports habitat suitable for Spring-run and steelhead trout in the North Yuba and Middle Yuba rivers under current conditions. The Upper Yuba River Studies Program documented that the Middle Yuba could likely satisfy the Habitat Expansion Threshold under today's condition. The North Yuba also has a substantial amount of suitable habitat today, and the South Yuba could likely support anadromous fish with additional releases of cold water from Spaulding Dam.

We strongly support the reintroduction of anadromous fish to the Yuba River watershed. However, we want to ensure that the HEA program is not used to implement actions that would otherwise be the subject of regulatory or judicial requirements, as prescribed by section 3.2 of the HEA. As such, we request the Steering Committee explore ways in which the HEA might contribute to the restoration of Spring-run and steelhead populations in the upper Yuba River by satisfying the Habitat Expansion Threshold above and beyond what will be achieved through other venues, consistent with section 3.2 of the HEA.

5) American Rivers requests that the Steering Committee add to the Working List of potential actions the possibility of providing access to the Middle Fork Feather River, in addition to the North Fork Feather action as requested above. The Middle Fork Feather passage concept was discussed during the relicensing of the Oroville Facilities, and was specifically requested to be included in the evaluation by the National Marine Fisheries Service and American Rivers during negotiations that produced the HEA. The concept would involve trapping returning adults below the Fish Barrier Dam, and transporting them to the Middle Fork Feather for release, destination to be determined.

Juveniles could be collected by a net gulper system in Lake Oroville and transported downstream of Oroville Dam. NMFS and American Rivers could provide additional details.

In closing, I would like to thank you again for your efforts to implement the HEA. I am confident the process will benefit Spring-run salmon and steelhead populations.

Sincerely,

A handwritten signature in blue ink, appearing to read "Steve Rothert", with a stylized flourish at the end.

Steve Rothert
Director, California Field Office